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# Power and Constraint: National Security Law after the 2012 Election

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A stylized world map in shades of blue and white, overlaid on a grid of latitude and longitude lines. The map is centered on the Atlantic Ocean.

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POWER AND CONSTRAINT:  
NATIONAL SECURITY LAW AFTER  
THE 2012 ELECTION

*Jack Goldsmith*

# POWER AND CONSTRAINT: NATIONAL SECURITY LAW AFTER THE 2012 ELECTION

*Jack Goldsmith\**

Thank you very much, Michael. And thanks to you and everyone at the Cox Center for organizing this conference and inviting me to speak. The title of my lecture derives from my book *Power and Constraint: The Accountable Presidency After 9/11*.<sup>1</sup> Today I will talk about the themes of the book as they apply to the topic of this conference.

The title of this conference invites the question: What's at stake in this election for presidential power and foreign affairs and national security law? My basic answer is that relatively little is at stake. This is not a claim about whether our policy toward Israel or Iran or China will change. I'm not an expert in those fields, and I believe such things are hard to predict in any event. Rather, I'm going to focus on what might be called "legal policy" topics related to presidential power, national security law and foreign relations law. My claim is that legal policy in these areas will continue on the same basic track of the last few years regardless of who is elected president.

This prediction is not based on an analysis of campaign speeches or party platforms. The 2012 Republican platform said hardly anything about national security legal policy issues. But even if it did, I don't think it would mean much for a possible Romney presidency. If you think I am wrong, if you believe that platforms matter, and if you are inclined to think there will be a big difference between a President Obama and a President Romney on the issues before us, I invite you to think back to how much President Obama promised he would change President Bush's policies during the presidential campaign of 2008.<sup>2</sup>

In fact, as we all know now, despite these pledges, and contrary to expectations, President Obama was much more aggressive than expected in asserting presidential powers.<sup>3</sup> In many contexts, he continued late Bush-era policies (such as state secrets, surveillance, military detention). In other contexts, he continued but accelerated

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\* Jack Goldsmith is the Henry L. Shattuck Professor at Harvard Law School. This speech was delivered on September 7, 2012, prior to the election.

1. JACK GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11* (2012).
2. I summarize these pledges in *Power and Constraint*, chapter 1.
3. *See generally id.*

trends that prevailed in the late Bush Administration. Consider three examples of the latter phenomenon. First, the Obama Administration ended the CIA interrogation and black site program. But that program was dying and practically non-operational during the last two years of the Bush Administration.<sup>4</sup> Second, Obama ramped up targeted killings once in office, but he was actually continuing a trend of ramped-up targeted killings during the last two years of the Bush Administration.<sup>5</sup> Finally, President Obama worked with Congress to tighten the rules for military commissions, but those changes were relatively small and continued a trend that had begun in 2002.<sup>6</sup>

Understanding the structural factors that led President Obama to continue President Bush's policies in these ways is the key to understanding why our basic national security legal policies will persist beyond the next election regardless of who is president. Obviously, if President Obama wins the election, he can be expected to pursue the same basic policies that he followed during the first four years. The more interesting claim is that if Romney wins the election, he won't change Obama's policies much. So what are the structural factors that led Obama to follow Bush and that would lead Romney, if he wins, to follow Obama?

First, and most obvious, is the responsibility of the presidency. It is a truism that governing is much more difficult than campaigning. The occupant of the Oval Office has undelegable responsibilities for the security of the nation (and in many respects for the security of the world). Every president knows that he is invariably responsible for national security catastrophes. This responsibility focuses every president's attention, and causes him to be risk averse about national security and to spend an inordinate amount of time and energy protecting national security.

Second and relatedly, when the president enters the Oval Office, he gets access to national security information that the public cannot see. The president knows a lot more about what's going on than the public does and what the president sees is a lot scarier than what the public sees. The threat looks much greater from the inside than it does from the outside. This asymmetric insider information leads every president to act relatively aggressively to protect national security.

Third, every president assumes the perspective of the executive branch and inherits the practices and precedents that have defined the institution for over two centuries. No president is going to simply discard those practices and precedents, including the practices and precedents that support the exercise of presidential power—especially

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4. *See id.* at 16, 19.

5. *Id.* at 13–14.

6. *Id.* at 7–10.

since, as just mentioned, the president has these enormous responsibilities to keep us safe. As we learned when Barack Obama came to office, presidents won't renounce basic presidential powers and tools that are available and that can be deployed to keep the country safe.

The fourth factor that undergirds continuity in national security legal policies across administrations is the national security bureaucracy. When a new administration comes in there is turnover at the surface of this bureaucracy. But just below the surface, one finds most of the same people from the previous administration, addressing exactly the same problems, collecting the same information, analyzing that information, and sending it to the new president. President Obama was unusual in keeping many of his predecessor's top national security officials, including his Defense Secretary (Robert Gates), his FBI Director (Bob Mueller), and his head of the National Counterterrorism Center (Michael Leiter). And even when there was change at the top, such as when Leon Panetta became Director of the CIA, there was continuity just below. Panetta's top Deputy at the CIA was Stephen Kappes, a long time CIA official who had significant responsibilities for the controversial CIA black site and interrogation program; and his general counsel for his first year was John Rizzo, the thirty-five-year veteran of the Bush years and intimately involved in its controversial programs.<sup>7</sup> I don't mention the persistence of bureaucratic outlook to tell a nefarious story about the unelected bureaucracy running the country. The point is simply that national security problems are worked on across many administrations by professionals who continue to work on them when a new administration comes in, and inevitably the president's information and advice and range of options are formed and to some degree bounded by what these professionals tell him.

Fifth, and finally, I come to the largest and most important factor that led to continuity—constitutional checks and balances. A central theme of my book, *Power and Constraint*, is that the main reason Obama continued the trends and policies of the Bush Administration was that the Bush policies as they stood in January 2009 had been dramatically changed over the previous five years. The Bush policies had changed in just about every area of counterterrorism policy, including military commissions, military detentions, surveillance, black sites, interrogation, habeas corpus, and the like. In all of these areas, Bush's powers narrowed, in some contexts significantly. Why did this happen? Because, contrary to conventional wisdom, our constitutional checks and balances had worked remarkably well.

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7. See *id.* at 27–28.

The courts engaged the president during wartime like never before and issued decisions that narrowed presidential power in unprecedented ways. This was true in the *Hamdi* case in 2004, which recognized due process rights for enemy soldiers for the first time.<sup>8</sup> It was true in the *Hamdan* case in 2006, which not only struck down the president's military commissions, but also recognized, without giving any deference to the president's contrary interpretive view, that Common Article 3 of the Geneva Convention governed in the war with al-Qaeda.<sup>9</sup> That rule had profound implications inside the executive branch.<sup>10</sup> And finally in 2008 in *Boumediene*, the Court held that the writ of habeas corpus as a matter of constitutional law extended to Guantanamo and that the detainees at Guantanamo had a right to pursue habeas corpus release in courts in the United States.<sup>11</sup> All those rulings had the effect, in combination with other factors, of changing Bush's policies, of moderating Bush's policies, in many respects, of narrowing presidential power. They also had the effect (in combination with other acts, discussed below), of enhancing the legitimacy of these presidential practices.

In addition to courts, and again contrary to popular opinion, Congress was deeply involved in pushing back against the presidency. This happened most significantly in 2005 when it enacted the Detainee Treatment Act, which closed a loophole in interrogation law.<sup>12</sup> Despite the famous Bush signing statement, the Detainee Treatment Act stopped the CIA's interrogation program in its tracks.<sup>13</sup> Congress also had a big impact in narrowing and constraining the president in the Military Commissions Act of 2006.<sup>14</sup> Congress, in 2008, did give President Bush, at his lowest point of his presidency, large surveillance powers in the FISA Amendments Act.<sup>15</sup>

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8. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 538 (2004) (“[A] court that receives a petition for a writ of habeas corpus from an alleged enemy combatant must itself ensure that the minimum requirements of due process are achieved.”).
  9. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 631–32 (2006) (holding that Common Article 3 is applicable to Hamdan, entitling him to judicial protection).
  10. See GOLDSMITH, *supra* note 1, at 179–81, 186–87.
  11. See *Boumediene v. Bush*, 553 U.S. 723, 771 (2008) (“Petitioners, therefore, are entitled to the privilege of habeas corpus to challenge the legality of their detention.”).
  12. See Detainee Treatment Act of 2005, Pub. L. 109–148, 119 Stat. 2739.
  13. GOLDSMITH, *supra* note 1, at 119–121.
  14. See Military Commissions Act of 2006, Pub. L. No. 109–366, 120 Stat. 2600; GOLDSMITH, *supra* note 1, at 187–91.
  15. See Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub. L. 110–261, 122 Stat. 2436.

But they did so with an unprecedented array of internal checks and balances that, in my opinion, significantly improved the legitimacy and the efficacy of surveillance in the United States.

These changes by the Court and Congress were supported by and in some senses made possible by other powerful forces at work. The press was much more aggressive in reporting government national secrets than ever before.<sup>16</sup> Many of the published reports about secret national security activities inside the Bush Administration led to reforms in Congress and the Supreme Court.<sup>17</sup> In addition, non-governmental organizations were very powerful, both in litigating claims that led to some of these landmark decisions, and in criticizing the Administration, extracting information, and leading campaigns.<sup>18</sup>

The forces that pushed back against Bush also pushed back against Obama, though from the other direction. When Obama tried to close GTMO and to conduct criminal trials of GTMO detainees, Congress pushed back hard through legislation and effectively stopped the president from doing so.<sup>19</sup> So the supposedly feckless Congress that moved Bush to the center from where he was on interrogation, black sites, and military commissions also forced Obama toward the center when he tried to change national security policy in a way that Congress did not approve.

These are the larger forces that explain continuity between the Bush and Obama eras, and that I think will lead to continuity no matter who is elected president in 2012. The fact is that most big issues of national security law and policy today are settled and legitimated by our constitutional system. There is a remarkable consensus in the country today about the scope of counterterrorism policies—a consensus reflected in Congress, in the courts, and in a White House occupied by the first two post-9/11 presidents. Regardless of who is president, this consensus won't change much unless there is some large external shock to the system like another attack or some other dramatic external event.

I now want to turn to under-appreciated structural considerations that affect the presidency and that I do think could affect change in counterterrorism policies. Not all structural considerations lead to continuity. There are some that lead to difference, and I want to close by talking about one.

What the public and Congress and courts think about the president's beliefs and dispositions, and how much they trust the president on certain issues, informs the effective scope of presidential

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16. See GOLDSMITH, *supra* note 1, at 51–82.

17. *Id.* at 67–68.

18. See *id.* at 161–201.

19. See *id.* at 44–48.

power on national security issues. Since George W. Bush had the reputation of being a cowboy of sorts, and when he took aggressive counterterrorism actions, many worried, with reason, that he might not be adequately controlled. But one heard very few complaints. George Bush was engaged in what we might call softer counterterrorism tactics, like trying criminals in civilian courts, which he did all the time. Similarly, few complained when Bush released hundreds of detainees from GTMO. Very few people complained about these policies because—and I'm generalizing here, but it is a fair generalization, I think—the Democrats liked the policy and the Republicans liked the president. That's too simple, of course, because on some issues (like interrogation) bipartisan majorities pushed back against President Bush. But as a basic slogan to capture a complex but real phenomenon, I think it works.

The same thing happened in mirror image with Barack Obama. He came to office as a former constitutional law professor committed to civil rights. When he took "soft" initiatives like trying to close GTMO or to have civilian criminal trials for GTMO detainees, Republicans and Democrats in Congress pushed back. Some of this is politics of course, but some of it is insufficient trust of the president on such issues. On the other hand, Obama has gotten much more of a free ride than Bush did when he does aggressive things. For example, I think that the significant ramping up of the drone program, if it had happened under a Republican administration, would have been received much more harshly by Congress than it has been under Obama. For drones, Republicans like the policy and Democrats like the president.

So, what are the implications of this point for the next election? If Obama continues in office then that same dynamic will play out. If Romney wins the presidency, we'll go back, I think, to something like the Bush dynamic. I think Romney will have more leeway for releasing people from GTMO and having civilian criminal trials, but less leeway on drones and enhanced interrogation.

This leads to my final point. One of the issues that I think is not completely resolved and is going to be an issue for the next president is the Authorization for Use of Military Force (AUMF) and its increasing antiquation. The AUMF was, as most of you know, enacted in September 2001. It is the basic legal grounding for most of the things the president is doing in the "war on terror." The AUMF authorized the president to use all necessary and appropriate force against states, persons and organizations who were responsible for 9/11. It has been interpreted by presidents to include not only al-Qaeda and Taliban, but associated forces of al-Qaeda and the Taliban, not just in Afghanistan and Pakistan, but around the world including Yemen and Somalia and elsewhere. The problem is that the terror threat is moving away from al-Qaeda and its affiliates and is moving towards what I call extra-AUMF threats, which are



threatening groups that lack any affiliation with al-Qaeda.<sup>20</sup> The problem for the executive branch is that the AUMF is increasingly unhelpful to the president in meeting developing threats. There's a growing gap between the threat and what the AUMF authorizes the president to do.<sup>21</sup>

I think that as a result of this trend, there is going to be a push for a new AUMF in the next four years. And here's a non-disprovable prediction: If Barack Obama is President, he will garner a much more pro-presidential power AUMF than if Romney is elected, because he would be more trusted in the exercise of aggressive presidential powers (just as he receives more trust than a Republican would on drones). The upshot of this prediction is that if you're worried about a new and expanded AUMF and you want to cabin it as much as possible, you should vote for Mitt Romney.

Thank you very much.

PROF. SCHARF: Jack has graciously offered to entertain your questions for 15 minutes. We have two microphones up here. I need you to come down and line up. Please state your name and your affiliation and ask a question and keep it short, because that way many other people can join in. If you're up in the overflow room, and I know there's about sixty people up there, please, also come down during this period and ask your questions. So, we'll start with Professor Shabalala.

AUDIENCE MEMBER 1: Good morning. It's a real pleasure to have you. My name is Dalindyboe Shabalala. I'm a visiting professor here. I teach at Maastricht University in the Netherlands. A question about how you draw the line between discretion and legality. On some of these issues, I know for example with respect to the CIA decision not to continue the interrogation program,<sup>22</sup> it strikes me that with the signing statement, what we see is that as an act of policy and discretion rather than admitting on the part of the establishment there is an actual legal barrier there. So it's an exercise of discretion, and I wonder whether you think that exercise in discretion has been—is coextensive with our concept of the legality of the actions?

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20. See Jack Goldsmith, *The Growing Problem of Extra-AUMF Threats*, LAWFARE (Sept. 30, 2010, 11:53 PM), <http://www.lawfareblog.com/2010/09/the-growing-problem-of-extra-aumf-threats/>.

21. See generally Robert Chesney, *Beyond the Battlefield, Beyond Al Qaeda: The Destabilizing Legal Architecture of Counterterrorism*, 111 MICH. L. REV. (forthcoming 2013), available at <http://ssrn.com/abstract=2138623>.

22. See GOLDSMITH, *supra* note 1, at 120.

And too then, after that, this concept of accountability. I think that is one of the biggest problems, I think, for a lot of the people over the past ten years is that even with so much that has been going on, so much that might have been considered illegal or, at least, should have been investigated as illegal, many people would argue, the sense of accountability for overreach or accountability beyond, I think, political accountability, but legal accountability, is that that's missing, that nobody has paid a legal accountability price for much of the action that took place, including such things as torture. Do you think this is partly a function of the presidential power to protect other executive offices and that's one of the reasons why or is there simply more of a political ambition not a prosecutorial discretion not to investigate?

PROF. GOLDSMITH: There's a lot there. On the first question, when the CIA went to the White House in late 2005 and said that it was not going to continue with the interrogation program, it didn't invoke its discretion. It said that it had interpreted the law and concluded that the program had become illegal and that as a result it wasn't going to continue. So, the CIA was interpreting the law and disagreeing with the president, who had a different view. Think about this in light of the debate about the unitary executive, which the Bush Administration was supposedly committed to.<sup>23</sup> What the unitary executive means in this context is that the president is the chief law interpreter and can enforce that interpretation on subordinates. But that's not what happened here. Instead, a subordinate national security agency said, "we've interpreted the law, and we're simply not going to do this anymore." This is a remarkable example of law being interpreted within the bureaucracy to put a stop of a practice against the president's wishes, not as a matter of discretion, but as a matter of law.

Your accountability question is a hard one. I talk about this a lot in my book.<sup>24</sup> Accountability is a broad term and I think many people too often assume that criminal law accountability is the only form of accountability. It is true that there have been few criminal prosecutions arising out of the CIA program. But accountability is a broader concept. It occurs whenever an actor is subject to account by another institution that has the power to punish it or in some way alter its behavior. By this broader definition, the CIA program has been subject to extraordinary accountability unlike anything in our nation's history. There have been scores of investigations of the CIA

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23. See STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE* 3–36 (2008).

24. See, e.g., GOLDSMITH, *supra* note 1, at 233–43.

program, some still ongoing.<sup>25</sup> Those investigations have imposed real costs on lots of people, causing them to lose their jobs, to suffer financially, and to have their reputations dimmed and in some cases ruined. In addition, these activities were subject to two separate criminal investigations across two administrations. In the Obama Administration, John Durham spent years turning the program upside down, and he concluded that he did not have the evidence adequate to bring a successful prosecution.<sup>26</sup>

Durham was investigating people who acted outside their authorizations by top Bush officials. I think there was an element of political calculus by President Obama in not being more aggressive in trying to bring criminal actions against the Bush Administration officials who gave the authorizations. The president and his subordinates are supposed to take into account community concerns, broadly conceived, in deciding whether to prosecute. I think he considered several factors in declining to do more in this context. Any attempted prosecution of a Bush Administration official for something that happened early in the war on terrorism would have been enormously controversial. It would have been very difficult, under any circumstances, to get a conviction, assuming that there was a criminal violation. And so an attempted prosecution might have been self-defeating because it might have alleviated some of the stigma that now attaches to the early interrogation program. And of course, because of the controversy that would have surrounded an attempted prosecution, everything else the president was trying to accomplish would have been jeopardized.

AUDIENCE MEMBER 2: My name is Ben Davis, University of Toledo. My question is the following: To the extent that people know that we tortured, as said in a recent report, yesterday, again, Libyans saying they were waterboarded in Afghanistan,<sup>27</sup> to the extent that most Americans feel that they were lied into the war in Iraq, how is it that in this consensus that it was the inability of the system, of this group that forms our national security strategy, or national security group, to get or be made to bear some kind of accountability for the enormous things that some people call crimes, like lying us into war or torture in our system. And I understand overseas, how the accountability affects things going on overseas. I understand there is an investigation going on in the European Court of Human Rights, on

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25. *Id.* at 108–12.

26. See Scott Shane, *No Charges Filed on Harsh Tactics Used by the C.I.A.*, N.Y. TIMES, Aug. 31, 2012, at A1.

27. See Charlie Savage & Scott Shane, *Libyan Alleges Waterboarding by C.I.A. in Afghanistan, Rights Group Says*, N.Y. TIMES, Sept. 6, 2012, at A9.

what happened in the CIA black site in Poland and those proxy sites that are having their authorities looking at the things they did for us and deciding on prosecution for the things that we did.<sup>28</sup>

PROF. GOLDSMITH: I don't think I have much more of an answer than the one I just gave. I do think that there has been extraordinary accountability in terms of unprecedented scrutiny and various forms of non-criminal punishment, as I described. So I disagree with you on your claim that there hasn't been a lot of accountability. And I think criminal prosecution, for reasons just stated, was simply infeasible. I don't claim, by the way, that there has been adequate accountability. My aim in the book is simply to rebut the claim that there has not been accountability. But whether there has been too much or too little is a very difficult normative question.<sup>29</sup> To determine whether there's been adequate accountability you have to consider all the systemic effects of accountability that you're talking about, including the systemic effects on national security, the systemic effects on everything else that the government is trying to accomplish. I think that any attempted criminal prosecution of top Bush officials would have blown up in President Obama's face and failed, and President Obama realized this. I also think that an attempted prosecution might have watered down the disapprobation or taboo that today attaches to certain interrogation practices. I think President Obama took all these considerations into account in deciding to do what he did.

AUDIENCE MEMBER 3: I agree with your thesis that there has been significant overlap in continuities between President Obama and President Bush with regard to national security but I think there are significant differences in regard to foreign affairs. I was wondering if you would speak to that. For example, I think that the Bush Administration took a much more unilateral approach to decision making. They were far more able to launch what some people call illegal wars in Iraq.

The Obama Administration, by contrast, had been far more willing to extend a helping hand to Iran. He used military force far more parsimoniously. There has been a strategic pivot away from the Middle East towards Asia. There has been a less striped tone with the Muslim world. So, I'm wondering, conceding that there's been

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28. See Christian Lowe & Pawel Sobczak, *Poland Provides Answers for CIA Prisons Probe*, REUTERS (Sept. 5, 2012), <http://www.reuters.com/article/2012/09/05/oukwd-uk-poland-usa-rendition-idAFBRE88415V20120905>.

29. See GOLDSMITH, *supra* note 1, at 233–43.

significant overlap in continuity with national security, where do you think your thesis will also hold?

PROF. GOLDSMITH: As I said at the outset, my expertise is not in pure foreign policy and I wouldn't deny that President Obama has a different foreign policy than former President Bush, although, a lot of people have written about the remarkable similarities about how a lot of the things that President Obama started set out to do ended up looking a lot more of what President Bush might have done.

But I do want to take issue with one ironic claim you made about the unilateral approach to decision making in war. When President Bush went to war, he got congressional authorization, both in September 2001 and in October 2002. President Obama, by contrast, did not get congressional authorization for the Libya invasion and he is in my opinion the first president to overtly violate the War Powers Resolution.

AUDIENCE MEMBER 4: Jack, great presentation; great book. I did want to congratulate you. An interesting issue. The new book, *No Easy Day*,<sup>30</sup> has come out in which a Navy SEAL says that they went after bin Laden, one of them popped him in the head with a rifle round, they slowly crept up into the room. They looked in. They found him lying in the door in the throws of death, quivering, trembling, something like that. No sign he was a threat and then they pumped several more rounds into his body.

This leads to an issue that has haunted me but maybe it's ignorance. Could it be said that this administration has taken the stance that since you can't interrogate them in a method that's likely to get useful information and word has gotten out, we really don't need any prisoners, and it's better to shoot them a couple more times than to have to feed and house them and worry about the lawyers?

PROF. GOLDSMITH: Good question, Bob. I haven't read the book.

AUDIENCE MEMBER 4: Maybe a war crime?

PROF. GOLDSMITH: It might be, the way you described it. But let me just answer the question on a little more abstract level. You implicitly raise the question whether the Obama Administration has substituted targeted killing for detention and interrogation. The rise of targeted killing and the decline of detention and interrogation was actually a trend that began in the last two years of the Bush Administration. The Obama Administration continued this trend, relying much more

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30. MARK OWEN & KEVIN MAURER, *NO EASY DAY* (2012).

heavily on targeted killing strikes and less on detention and interrogation.

This raises the question about whether one is a substitute for the other. I've talked to a lot of people in the administration about this and here's what I can tell you. Everyone at the top of the administration fervently denies that there's any overt policy of tradeoff. I think that is right. But there are many people lower down who say that interrogation and detention became so fraught, legally and politically, that when it's lawful to kill, that that option simply is a more readily available option for dealing with the enemy. And I think the tradeoff is inevitable. If you make one tool for incapacitating the enemy less available, you're going to use the other tool. I do think that's what happened. I have no idea if it's happened in the Bin Laden context, but I do think it's happened, in general.

Thank you, very much.

PROF. SCHARF: Thank you, again, Jack for a fantastic keynote for this conference. His book, which I'm holding up is really a great read. Buy it from Amazon and put it on your Kindle.